



INTERNATIONAL CONFERENCE ON THE  
REVISION OF THE SUA TREATIES  
Agenda item 6.1

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**CONSIDERATION OF A DRAFT PROTOCOL TO THE CONVENTION FOR THE  
SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF  
MARITIME NAVIGATION, 1988**

**Comments on the protections afforded to the shipping industry**

**Submitted by the United States and the International Confederation of  
Free Trade Unions (ICFTU)**

**SUMMARY**

<i>Executive summary:</i>	This document comments on the provisions of the draft protocol to amend the SUA Convention, as revised by the Legal Committee
<i>Action to be taken:</i>	Paragraph 14
<i>Related documents:</i>	LEG/CONF.15/3, resolutions A.924(22), A.930(22), A.931(22) and A.947(22), C 89/D (paragraph 12.1(v))

**Introduction**

1 This document is submitted to elaborate the views of the Government of the United States of America and the International Confederation of Free Trade Unions (ICFTU) on the draft protocol to amend the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 (SUA) and its provisions, as revised by the Legal Committee at its ninetieth session, held from 18 to 29 April 2005, (document LEG 90/15 refers) with regard to the protections afforded to the shipping industry.

2 Following the adoption of IMO Assembly resolution A.924(22) the IMO Legal Committee has, for the last three years, worked on amending SUA to incorporate substantial amendments aimed at strengthening the SUA treaties in order to provide an appropriate response to the increasing risks posed to maritime navigation by international terrorism. Proposed amendments to the treaties in the revised draft protocols include a substantial broadening of the range of offences included in article 3 of the SUA Convention and the introduction of provisions for boarding vessels suspected of being involved in terrorist activities in article 8.

3 The amendments include criminalizing certain activities relating to the use of a ship as a weapon, the transport of terrorists, and the illicit shipment of weapons of mass destruction. The amendments also seek to provide an additional tool to combat the proliferation of weapons of mass destruction in line with United Nations Security Council Resolution 1540 (2004) on the non-proliferation of weapons of mass destruction. The new provisions drafted by the IMO Legal Committee seek to balance the security concerns with the human rights of seafarers and the legitimate interests of the shipping industry by providing enhanced protection for innocent seafarers and carriers.

### **Comprehensive protection for seafarers**

4 The United States and ICFTU believe that the proposed amendments to the SUA Convention, in giving effect to United Nations Security Council Resolution 1540 (2004), will strengthen the international legal basis to impede the flow of proliferation-related shipments by sea and prosecute transporters in the case of illegal conduct, while at the same time providing seafarers and carriers with a regime which expands on other international instruments of this type which include ship boarding provisions. The provision of such safeguards is consistent with the mandate of the Organization and IMO Assembly resolutions A.930(22), A.931(22), resolution 11 of the 2002 SOLAS Conference on human element-related aspects and shore leave for seafarers, which considered that, given the global nature of the shipping industry, seafarers need special protection, and IMO Assembly resolution A.947(23), on the Human element vision, principles and goals of for the Organization, as well as the decision of the eighty-ninth session of the Council (document C 89/D, paragraph 12.1(v)) to:

- .1 instruct the Committees of the Organization and through them their subsidiary bodies, when developing new instruments or amendments to existing ones, to ensure that these are compatible and not in conflict with other instruments of international law and that they cannot be interpreted or used in a way that conflicts with such instruments and in particular the ones addressing human rights;*

5 The boarding provisions of draft article 8*bis* include a comprehensive set of procedures and protections that will ensure flag State jurisdiction is respected, and at the same time facilitate the boarding of a vessel reasonably suspected of committing or attempting to commit a violation of the SUA Convention. The protections afforded innocent seafarers and carriers are extensive and in some cases will appear in an international instrument for the first time. It is essential that they will be interpreted in such a way so as to achieve their aim in practice. These safeguards require the boarding party to:

- take due account of the need not to endanger the safety of life at sea (paragraph 10(a)(i));
- ensure that all persons on board are treated in a manner which preserves their basic human dignity, and in compliance with the applicable provisions of international law, including international law of human rights (paragraph 10(a)(ii));
- take due account of the safety and security of the ship and its cargo (paragraph 10(a)(iv));

- ensure that persons on board against whom proceedings may be commenced in connection with any of the offences set forth in articles 3, *3bis*, *3ter* or *3quater* are afforded the protections of article 10(2), regardless of location (paragraph 10(a)(vii));
- ensure that the master of a ship is advised of its intention to board, and is, or has been, afforded the opportunity to contact the ship's owner and the flag State at the earliest opportunity (paragraph 10(a)(viii)); and
- take reasonable efforts to avoid a ship being unduly detained or delayed (paragraph 10(a)(ix)).

6 These safeguards are particularly important to protect seafarers and carriers. In addition States Parties shall be liable for any damage, harm or loss attributable to them arising from measures taken pursuant to article *8bis* when the grounds for such measures prove to be unfounded (provided that the ship has not committed any act justifying the measures taken), or such measures are unlawful or exceed that reasonably required in light of available information to implement the provisions of article *8bis*, and shall provide effective recourse in respect of such damage, harm or loss (paragraph 10(b)).

### **Criminal liability of seafarers**

7 The safeguard provisions of the SUA protocol will ensure that innocent seafarers will not be subjected to criminal prosecution under the amended SUA Convention simply for being on board a vessel that was engaged in or used for illegal purposes. This is the case even if the seafarer has mere knowledge of the criminal activity.

8 The offences enumerated in article *3bis* 1(b) (the so-called transport provisions) apply by virtue of article 1(b) to those persons who initiate, arrange or exercise effective control, including decision-making authority, over the movement of a person or item. This definition would exclude from criminal liability seafarers and employees on shore, except in those rare cases where they are actively engaged in the criminal activity.

9 Further, the amendments make clear that persons including seafarers who have not intentionally participated in carrying out the acts proscribed by the SUA Convention will not be subjected to criminal prosecution.

10 Persons on board a vessel who have no knowledge of – and have not intentionally participated in – conduct that is illegal under the Convention, cannot be the subject of criminal prosecution by their mere presence on board that vessel. Both under the existing article 3, and under the offences proposed for inclusion as articles *3bis*, *3ter*, and *3quater*, a person cannot be found to have committed an offence within the meaning of the Convention unless they have “unlawfully and intentionally” committed an act that is explicitly proscribed by the Convention.

11 The individual offences contain further subjective elements that would exclude innocent carriers and seafarers from their reach. For example, under the dual-use offence provision (article *3bis* 1(b)(iv)), the transporter must have the intention that the dual use items will be used in the design, manufacture or delivery of a biological, chemical or nuclear weapon. In most situations, a seafarer, for example, would not have the requisite general knowledge and intent, let alone the additional specific intent required under this provision. When containers are ordinarily sealed and loaded at port, a seafarer would not know what is in the containers. In order for a

seafarer to be held criminally liable, a prosecuting State must prove, for example, that the seafarer (1) knew what the item was, (2) intentionally initiated, arranged or exercised effective control, including decision-making authority, over the movement of the item by, for example, smuggling the item on board or placing the item in a container to be loaded on the ship and (3) had the intention that the item will be used in the design, manufacture or delivery of a biological, chemical or nuclear weapon.

## **Conclusion**

12 It should be recognized that the boarding provisions of article 8*bis* represent a carefully crafted balance between the various concerns and has been subject to extensive debate. It has not proved easy to reach a package on a number of difficult issues, including: consideration of measures other than boarding (article 8*bis* 3); affirmation that boarding will be governed by the express consent of the flag State (article 8*bis* 5(c)); the recognition of flag State jurisdiction after boarding (article 8*bis* 8); a claims provision that is grounded in existing claims instruments (article 8*bis* 10(b)); and the set of safeguards provided. It is hoped that this carefully crafted and effective compromise will not be disturbed.

13 One area that is not addressed is the fair treatment of seafarers who may be deemed to be witnesses and required to give testimony in subsequent proceedings. It is to be hoped that principles developed in the ongoing work of the Joint IMO/ILO *Ad Hoc* Expert Working Group on the Fair Treatment of Seafarers in the Event of a Maritime Accident will serve as useful guidance.

## **Action requested of the Conference**

14 The Conference is invited to take note of the contents of this document.

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